U.S. Department of Homeland Security
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Washington, DC 20529

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U.S. Citizenship and Immigration Services

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[redacted]

FILE: WAC 08 149 54477 Office: CALIFORNIA SERVICE CENTER Date: JUL 08 2008

IN RE: Petitioner: [redacted]
Beneficiaries:

PETITION: Petition for a Nonimmigrant Worker Pursuant to Section 101(a)(15)(H)(ii)(b) of the Immigration and Nationality Act, 8 U.S.C. § 1101(a)(15)(H)(ii)(b)

ON BEHALF OF PETITIONER:

SELF-REPRESENTED

INSTRUCTIONS:

This is the decision of the Administrative Appeals Office in your case. All documents have been returned to the office that originally decided your case. Any further inquiry must be made to that office.

Robert P. Wiemann, Chief
Administrative Appeals Office

DISCUSSION: The nonimmigrant visa petition was denied by the Director, California Service Center, and certified to the Administrative Appeals Office (AAO) for review as required by 8 C.F.R. § 214.2(h)(9)(iii)(B)(*2*)*(ii)*. The decision of the director will be affirmed and the petition will be denied.

The petitioner is a landscape contractor. It desires to employ the beneficiaries as landscape laborers pursuant to section 101(a)(15)(H)(ii)(b) of the Immigration and Nationality Act, 8 U.S.C. § 1101(a)(H)(ii)(b) from March 1, 2008 to November 30, 2008. The Department of Labor (DOL) determined that the petitioner had not established a temporary need. The director agreed with the DOL and denied the petition. The director's decision to deny the petition has now been certified to the AAO for review.

Upon careful review of the entire record of proceeding, the AAO agrees with the director's decision to deny the petition. The AAO finds that the petitioner has not established that it has a temporary need for the services of the beneficiaries (landscape laborers) specified in the present petition. Accordingly, the director's decision will be affirmed and the petition will be denied.

Section 101(a)(15)(H)(ii)(b) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1101(a)(15)(H)(ii)(b), defines an H-2B temporary worker as:

> an alien having a residence in a foreign country which he has no intention of abandoning, who is coming temporarily to the United States to perform other temporary service or labor if unemployed persons capable of performing such service or labor cannot be found in this country . . . .

The regulation at 8 C.F.R. § 214.2(h) provides, in part:

> (6) *Petition for alien to perform temporary nonagricultural services or labor (H-2B)*:
>
> (i) *General*. An H-2B nonagricultural temporary worker is an alien who is coming temporarily to the United States to perform temporary services or labor, is not displacing United States workers capable of performing such services or labor, and whose employment is not adversely affecting the wages and working conditions of United States workers.
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> (ii) *Temporary services or labor*:
>
> (A) *Definition*. Temporary services or labor under the H-2B classification refers to any job in which the petitioner's need for the duties to be performed by the employee(s) is temporary, whether or not the underlying job can be described as permanent or temporary.
>
> (B) *Nature of petitioner's need*. As a general rule, the period of the petitioner's need must be a year or less, although there may be extraordinary circumstances where the temporary services or labor might last longer than one year. The petitioner's need for the services or labor shall be a one-time occurrence, a seasonal need, a peakload need, or an intermittent need:

> *(2) Seasonal need.* The petitioner must establish that the services or labor are traditionally tied to a season of the year by an event or pattern and are of a recurring nature. The petitioner shall specify the period(s) of time during each year in which it does not need the services or labor. The employment is not seasonal if the period during which the services or labor is not needed is unpredictable or subject to change or is considered a vacation period for the petitioner's permanent employees. 8 C.F.R. § 214.2(h)(6)(ii)(B)(*2*).

The regulation at 8 C.F.R. § 214.2(h)(6)(iv) states the following with regard to H-2B petitions filed after the DOL has denied temporary labor certification:

> (D) *Attachment to petition.* If the petitioner receives a notice from the Secretary of Labor that certification cannot be made, a petition containing countervailing evidence may be filed with the director. The evidence must show that qualified workers in the United States are not available, and that the terms and conditions of employment are consistent with the nature of the occupation, activity, and industry in the United States. All such evidence submitted will be considered in adjudicating the petition.
>
> (E) *Countervailing evidence.* The countervailing evidence presented by the petitioner shall be in writing and shall address availability of U.S. workers, the prevailing wage rate for the occupation of the United States, and each of the reasons why the Secretary of Labor could not grant a labor certification. The petitioner may also submit other appropriate information in support of the petition. The director, at his or her discretion, may require additional supporting evidence.

The precedent decision *Matter of Artee Corp.*, 18 I&N Dec. 366 (Comm. 1982), states the test for determining whether an alien is coming "temporarily" to the United States to "perform temporary services or labor" is whether the need of the petitioner for the duties to be performed is temporary. *Matter of Artee* holds that it is the nature of the need, not the nature of the duties, that is controlling.

The petitioner states that it seeks approval of the proffered position as a seasonal need.

To establish that the nature of the need is "seasonal," the petitioner must demonstrate that the services or labor are traditionally tied to a season of the year by an event or pattern and are of a recurring nature. The petitioner shall specify the period(s) of time during each year in which it does not need the services or labor. The employment is not seasonal if the period during which the services or labor is not needed is unpredictable or subject to change or is considered a vacation period for the petitioner's permanent employees. 8 C.F.R. § 214.2(h)(6)(ii)(B)(*2*).

The petitioner described the duties of the proffered position at Part A, section 13 on the Application for Alien Employment Certification (Form ETA 750) as follows:

> Laborer Landscape – Moves soil, equipment and materials. Digs holes and performs related duties to assist landscape gardener in landscaping grounds.

In its final determination notice, the DOL stated that the petitioner had not established a temporary need. In its decision, the DOL stated that the petitioner submitted its 2006 payroll report illustrating only seasonal full-time employees and copies of invoices for April, May and June 2007, and June and July 2006. Upon review of the documentation submitted, the DOL determined that the documentation did not adequately support a need for temporary help and, as a result, a request for information, (RFI) was mailed to the petitioner. In the RFI, the DOL requested documentation that clearly shows the work that will be performed for each month during the requested period of need, contracts specifying the actual dates when work will commence and end, or a summarized payroll report for a minimum of one year identifying separately and for each month the full-time permanent and temporary employment in the requested occupation. In response, the DOL states that the petitioner provided an unsigned and undated application and certificate for payment (contract) and identical invoices to what was originally submitted in April, May and June 2007. The DOL determined that the documentation submitted was inadequate as the contract was not signed or dated by both parties, did not specify when the work would commence and end and the invoices submitted did not cover each month requested during the period of need. Based on the above, the DOL was unable to render a positive determination on the petition.

The petition was filed on April 28, 2008. The petitioner did not provide the documentation discussed in the DOL's decision or countervailing evidence addressing the reason why the Secretary of Labor could not grant a labor certification. Consequently, the services to be performed by the beneficiaries and the petitioner's need to have additional workers to perform these services have not been shown to be a seasonal need. The petitioner has not submitted its contractual history and/or financial evidence to demonstrate that its business activity has formed a pattern where its needs for workers are traditionally tied to a season of the year and will recur next year at the same time. Simply going on record without supporting documentary evidence is not sufficient for purposes of meeting the burden of proof in these proceedings. *Matter of Soffici*, 22 I&N Dec. 158, 165 (Comm. 1998) (citing *Matter of Treasure Craft of California*, 14 I&N Dec. 190 (Reg. Comm. 1972)).

The petition cannot be approved for another reason.

The AAO notes that the petition appears to exceed the Congressionally mandated cap for the first six months of fiscal year 2008, which was reached on January 3, 2008.

As always, the burden of proof in these proceedings rests solely with the petitioner. Section 291 of the Act, 8 U.S.C. § 1361. Here, the petitioner has not met that burden.

ORDER: The decision of the director dated May 13, 2008 is affirmed. The petition is denied.